NO. 45316-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH H. WOODS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Res judicata and collateral estoppel (equitable doctrines that bar parties from re-litigating claims and issues respectively) conserve judicial resources and ensure finality in the decision-making process. These doctrines are particularly important in an administrative scheme like the Department of Labor and Industries, which uses its earlier decisions throughout the course of a claim. Without these equitable doctrines, the Department would have to verify and re-verify final and binding decisions, as claimants could collaterally attack decisions at every turn.

In this workers' compensation case, Joseph Woods did not timely appeal the Department's order establishing the date of manifestation of his occupational disease, making it final and binding. Consistent with statutes, the Department then used that order to calculate Woods's time loss compensation by averaging his wages for the 12 months preceding his date of manifestation. This resulted in reduced time loss compensation and an overpayment order.

Although Woods dislikes the result of the calculation, res judicata bars him from collaterally attacking the date of manifestation order, where the decision became final and binding. Even if res judicata does not apply, collateral estoppel would. Woods's unpreserved arguments do not overcome the order's preclusive effect. This Court should affirm.

II. ISSUES

A. Where Woods failed to timely appeal the order establishing the date of manifestation but now asks this Court to ignore that order, does res judicata bar Woods from making such a challenge?

B. If res judicata does not apply, does collateral estoppel bar Woods from challenging the final and binding order establishing the date of manifestation, where Woods did not timely appeal the order and the Department used that date to calculate Woods's time loss compensation rate and overpayment?

III. STATEMENT OF THE CASE

A. Years After Joseph Woods Retired, He Filed a Workers' Compensation Claim, Which the Department Allowed

In March 2003, Joseph Woods retired from Drury Construction, after working there since 1977, doing heavy labor. Ex 6.[1] He worked occasionally for Darrell Emel Tree Service between 2003 and 2005. Ex 6.

In June 2006, Woods filed a workers' compensation claim for bilateral rotator cuff tears, stating that Drury was the employer. Exs 1, 6. Woods told the Department that he retired and as of January 2006, he fished, traveled, and worked on an old car. Ex 7. The Department allowed Woods's claim as an occupational disease in January 2007 and paid benefits. Ex 8.

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[1]These exhibits are contained in the Board of Industrial Insurance Appeals' record.

B. The Department Issued an Order Establishing the Date of Manifestation for Compensation Purposes, Which Woods Did Not Timely Appeal

A couple weeks later, after reviewing the relevant medical records, the Department issued an order on January 19, 2007, setting the occupational condition's date of manifestation as April 13, 2006:

> The date of manifestation has been determined to be 04/13/2006 for compensation purposes because this is the date the disease required medical treatment.

Ex 9. The Department concluded that there were "no chargeable employers for this claim." Ex 9.[2]

The decision notified Woods that he had 60 days to appeal that decision or it would become final:

> THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS.

Ex 9 (capitalization in original). Woods filed no appeal within 60 days. Ex 14. Woods thus incorrectly asserts that the date of manifestation order is on appeal here. *See* Appellant's Br. at 14, 18.

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[2]Woods argues that before he received the date of manifestation order, the Department promised him that it would establish chargeable employers and percentages of liability. Appellant's Br. at 38. While the Department earlier asked Woods for additional information to determine "which employer(s) may be responsible" and the order allowing the claim stated that a subsequent order would establish chargeable employers and percentage of liability, the date of manifestation order also states, "[t]here are no chargeable employers for this claim." Exs 4, 8, 9.

C. The Department Averaged the 12 Months Preceding the Date of Manifestation to Arrive at Woods's Wage Rate to Determine His Time Loss Compensation Rate

Based on the date of manifestation, the Department averaged Woods's wages for the 12 months preceding that date and decided that Woods earned $825, equaling total gross wages of $68.75 per month. Ex 15. Having paid Woods time loss compensation using preliminary information, the Department determined that Woods had been overpaid time loss compensation in the amount of $2,542.62 for the period from May 23, 2007, through September 30, 2007.[3] Ex 19. The Department initially closed Woods's claim, awarding a lump sum permanent partial disability payment, but following Woods's appeal, it determined that he needed further treatment and kept the claim open, potentially increasing the permanent partial disability award. Exs 12, 16.

D. Woods Appealed the Wage Order and Resulting Overpayment, Arguing that the Date of Manifestation Order Was Incorrect, But Both the Board and Superior Court Concluded that Collateral Estoppel Barred Him from Challenging the Date of Manifestation Order

Woods asked the Department to reconsider the order establishing the date of manifestation, but the Department concluded that because Woods did not appeal within 60 days, it was final and binding. Ex 14.

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[3]Specifically, the order stated that Woods had received $3,551.05 in time loss compensation during that time period, but he was entitled to only $1,008.43. Woods thus owed the Department $2,542.62 for the overpayment.

Following Woods's request for reconsideration the Department affirmed both orders establishing his gross wage rate and concluding an overpayment. Exs 17, 18, 20.

Woods appealed those decisions to the Board of Industrial Insurance Appeals. BR 115-16.[4] The parties stipulated to the record consisting of 21 exhibits. BR 13-14. They also agreed that the Board needed to resolve the following issues: (1) whether the date of manifestation established in the date of manifestation order became final and binding on the parties; (2) whether the Department accurately calculated Woods's overpayment; and (3) whether the Department accurately calculated Woods's monthly wage and combined wage for April 2005 through March 2006. BR 21. If Woods won on the first issue, the remaining issues would be settled, but if Woods lost, the Board would decide the remaining two issues. BR 21.[5]

In a proposed decision, the hearings judge concluded that collateral estoppel prevented Woods from challenging the order establishing the date of manifestation, where he had failed to timely appeal that order. BR 30.

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[4]"BR" refers to the Board's certified appeal board record.

[5]Woods posits that the Board and superior court failed to honor this stipulation by either not remanding the case back to the Board or by not recalculating the wages. Appellant's Br. at 6, 8, 33, 40. But as the superior court concluded, Woods did not properly preserve this argument for review and he presented no evidence contradicting the calculations. CP 45-46; *infra* at 27-28.

The hearings judge also found that the Department correctly calculated the overpayment amount and Woods's wage rate. BR 30. On Woods's petition for review, the three-member Board agreed, issuing a decision and order affirming the Department's orders. BR 2-6. In Woods' petition for review, he argued only the date of manifestation order was not binding on him for purposes of calculating time loss, not that the calculations were incorrect. BR 9-11.

Woods appealed to superior court, which conducted a bench trial. CP 1-2, 50. The Department argued that res judicata prevented Woods from collaterally attacking the order establishing the date of manifestation. CP 15-20. Like the Board, the superior court concluded that collateral estoppel barred Woods from challenging the order establishing the date of manifestation, rejecting Woods's arguments that the order was ambiguous or that it resulted in an injustice. CP 43-44. The superior court also concluded that the Department correctly calculated Woods's gross wages and overpayment, reasoning that gross wages are based on the 12-month period from April 2005 to March 2006 (based on the date of manifestation order) and Woods presented no evidence or argument showing that the Department's wage and overpayment calculations were incorrect. CP 44-47. The court entered judgment for the Department, which Woods now appeals. CP 49-57.

IV. STANDARD OF REVIEW

On appeal, this Court reviews the superior court's decision rather than the Board's, using ordinary civil standards of review. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. While this Court reviews legal issues de novo, it reviews the superior court's factual findings for substantial evidence. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999); *Rogers*, 151 Wn. App. at 180.

Whether collateral estoppel bars relitigation of an issue is a legal question, reviewed de novo. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). This Court also reviews statutory construction questions de novo. *Bremerton Public Safety Ass'n v. City of Bremerton*, 104 Wn. App. 226, 230, 15 P.3d 688 (2001).

V. ARGUMENT

Woods failed to timely appeal the order establishing the date of manifestation. The Department must determine the date of manifestation to calculate his time loss compensation rate. Equitable principles—both res judicata and collateral estoppel—prevent him from collaterally attacking that order. He thus cannot now try to undo that order's legal effect, where it necessarily led to the wage and overpayment orders. This Court should affirm.

A. The Department Uses the Date of Manifestation to Calculate Time Loss Compensation for Occupational Disease Claims

The trial court, Board, and Department properly considered interrelated statutes, which must be interpreted together, to determine the date used to determine the wage rate. Courts interpret statutes to give effect to the Legislature's intent, looking first to the statute's language, which includes looking at both its text and context. *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991); *Bremerton Public Safety Ass'n*, 104 Wn. App. at 230. When determining a statute's plain meaning, the court considers all related statutes. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.2d 1020 (2007). If the plain language of the statute is unambiguous, as here, the court's inquiry is at an end. *Manary v. Anderson*, 176 Wn.2d 342, 352, 292 P.3d 96 (2013).

When reading the Industrial Insurance Act as a whole, several statutes operate together to require the Department to establish the date of manifestation, which it then uses to calculate benefits. First, the compensation rate used for benefits like time loss is determined when a worker first needs treatment or when the condition becomes disabling. RCW 51.32.180(b). Second, the Department provides the same benefits for occupational diseases as those provided for industrial injuries. RCW 51.16.040. Finally, the Department calculates time loss benefits using the

"time of injury." RCW 51.08.178(1). Since there is no set time of injury for occupational disease, the date of manifestation is used to calculate the time loss compensation rate. The Department followed that process here.

1. The date of manifestation must be established under RCW 51.32.180(b) in order to determine the benefit amount

The Industrial Insurance Act directs the Department to pay compensation and benefits for both industrial injuries and occupational diseases. RCW 51.16.040. The Department pays compensation and benefits for occupational diseases "in the same manner as compensation and benefits for injuries under this title." *Id.* While an injury is a "sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result," an occupational disease is not a singular event. RCW 51.08.100, .140. Rather, an occupational disease is a disease or infection that arises naturally and proximately out of employment. RCW 51.08.140. The "rate of compensation" for occupational diseases is established "as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim." RCW 51.32.180(b). "[E]mployment at the *time of injury* shall be the basis upon which compensation is computed" to determine the wage rate used to pay

time loss compensation and pension benefits. RCW 51.08.178(1) (emphasis added).

While RCW 51.08.178(1) refers to the "injury," in an occupational disease the injury is the date of manifestation. Woods admits this. Appellant's Br. at 23 ("'Date of manifestation' is often used as the occupational disease claim equivalent of 'date of injury.'"). The Supreme Court held this is the correct interpretation of RCW 51.08.178(1) and 51.32.180(b). In the context of occupational disease, "the counterpart to the date of injury is date of manifestation." *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 227-28, 883 P.2d 1370 (1994); *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 125-26, 814 P.2d 626 (1991). Under the date of manifestation rule, the date the disease actually requires medical treatment or causes disability, not the date of contraction, controls what rate of benefits apply. *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 12-13, 201 P.3d 1011 (2009).

Woods suggests that under *Harry* the date of manifestation rule does not always apply, but this is contrary to *Harry*, which recognized the long history of the date of manifestation rule and the Legislature's intent when it enacted the current version of RCW 51.32.180. *See* Appellant's

Br. at 23; *Harry*, 166 Wn.2d at 12-13. The legal standard is consistent and clearly established—the date of manifestation is the date of injury.[6]

The Department thus must determine the date of manifestation to calculate what rate of compensation applies, including what time loss rate applies.[7] This is consistent with WAC 296-14-350, which looks to the "date of manifestation" to determine how to pay benefits, and defines date of manifestation consistent with the RCW 51.32.180(b) by looking to when the condition needs treatment or becomes partially disabling:

> Benefits shall be paid in accordance with the schedules in effect on the date of manifestation. Manifestation is the date the disease required medical treatment or became totally or partially disabling, whichever occurred first, without regard to the date of the contraction of the disease or the date of filing the claim.

WAC 296-14-350(3).

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[6]Unlike in *Harry*, Woods presented no evidence showing that he was totally or permanently disabled prior to the date of manifestation. In *Harry*, the claimant's occupational disease, occupational hearing loss, occurred simultaneously with exposure to injurious noise and did not progress after the exposure ended. For that reason, his last injurious exposure under RCW 51.32.180 was the date he became partially disabled, which occurred before he sought medical treatment. *Harry*, 166 Wn.2d at 10-11. But here, Woods presented no evidence that he became partially disabled before seeking medical treatment, so under *Harry* and RCW 51.32.180, the date of manifestation controls the benefits.

[7] The Industrial Insurance Act explicitly requires that injuries and occupational disease be treated the same. *See* RCW 51.16.040. The Act is somewhat inconsistent in its use of terms. For example, RCW 51.32.090(3)(a) refers to dates of "injuries" but RCW 51.32.090(9)(b) refers to "dates of injury or disease manifestation." Yet no one contends that because RCW 51.32.090(3)(a) refers to only injuries that the benefits under this statute is not payable to workers with occupational diseases. Notably, here Woods cannot point to a statute that would provide a date to calculate wages other than the date of manifestation.

The Department's definition is consistent with the statute and has the force of law. *See Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002) (a properly promulgated rule has the force of law). Woods argues that the term "date of manifestation" is not used in the definition of wage and occupational diseases and that a worker could not understand what the term means. Appellant's Br. at 22, 30. This argument ignores Supreme Court precedent, RCW 51.32.180(b), and WAC 296-14-350(3), which all recognize the date of manifestation in the occupational disease context.

2. The Department properly used the date of manifestation to calculate Woods's time loss rate

The date of manifestation is the basis to determine Woods' wages for time loss compensation purposes. *See* RCW 51.08.178(1); WAC 296-14-350(3). Time loss compensation is a form of compensation, so the Department uses RCW 51.08.178's requirements to calculate the time loss compensation rate. "[M]onthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided." RCW 51.08.178(1). If a worker's employment, at the time of the injury or manifestation, is intermittent, "the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all

employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern." RCW 51.08.178(2).

Here, the Department ordered that Woods's date of manifestation is April 13, 2006 "for compensation purposes because this is the date that the disease required medical treatment." Ex 9. This language comports with the statutory requirement and Department regulation that compensation for occupational diseases occurs on the "date the disease requires medical treatment." RCW 51.32.180(b); WAC 296-14-350(3).

Woods's argument that the result would have been different if he instead had suffered an industrial injury on April 13, 2006 is not only wrong but also supports the Department's position. Appellant's Br. at 31. If this was an industrial injury, since Woods worked intermittently, the Department would look at his wages for the 12 months preceding the injury, exactly as the Department did here. RCW 51.08.178(2). No evidence shows that the Department miscalculated Woods's average wage for those 12 months, so the same result would occur.

B. Res Judicata Bars Woods from Challenging the Date of Manifestation Order

Res judicata bars Woods from challenging the date of manifestation order, where he essentially collaterally attacks the order

establishing the date of manifestation. Res judicata bars claimants from collaterally attacking final and binding Department orders, which is what Woods attempts to do. No exception to that doctrine applies.[8]

The Department retains original authority to adjudicate claims brought by injured workers and their beneficiaries. RCW 51.04.010; *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 783, 271 P.3d 356 (2012). Persons aggrieved by Department decisions may protest or appeal its adjudicative decisions. *See* RCW 51.52.050, .060. A claimant has 60 days to appeal a Department decision, and the failure to do so, even if the Department's decision was wrong, precludes any subsequent appeal. RCW 51.52.060(1); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 542-43, 886 P.2d 189 (1994). The Department's order becomes final and binding on all the parties and cannot be reargued by the claimant. RCW 51.52.110; *Marley*, 125 Wn.2d at 542-43. If a claimant fails to appeal the

[8]The Department argued below that this case should be analyzed under a res judicata analysis. *See* CP 15-20. An appellate court may affirm a superior court's decision on any legal ground supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997). Admittedly, much like the chicken-and-the-egg dilemma, there is understandable confusion about whether the Court should analyze this case under the res judicata lens or the collateral estoppel lens. Viewing this case one way, consistent with res judicata and Supreme Court case law, when the date of manifestation order became final and binding, res judicata precludes a party from challenging that decision, particularly when the Department uses that decision in a subsequent analysis. Under the collateral estoppel lens, the wage order is a separate proceeding from the date of manifestation, although it necessarily relies on that decision. As explained below, although res judicata appears to be the preferable doctrine, Woods's argument fails under either doctrine.

Department order, it is res judicata as to its terms. *Marley*, 125 Wn.2d at 537-38 (using the term claim preclusion rather than res judicata).

The difference between res judicata (claim preclusion) and collateral estoppel (issue preclusion) is that res judicata precludes a party from later relitigating a claim, while collateral estoppel precludes a party from later relitigating an issue within the claim. *Christensen*, 152 Wn.2d at 306. These doctrines "prevent relitigation of already determined causes, curtail multiplicity of actions, prevent harassment in the courts, inconvenience to the litigants, and judicial economy." *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961 (1980); *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 429 P.2d 207 (1967). This is particularly true in administrative actions, like the workers' compensation context, where appellate courts have applied res judicata more consistently than collateral estoppel. *See e.g.*, *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) (plurality); *Marley*, 125 Wn.2d at 542-43; *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 669, 175 P.3d 1117 (2008).

The reason is that a workers' compensation claim is a single claim seeking benefits, and the Department acts under the same claim when it issues a series of related orders (i.e., claim allowance or establishing the

date of manifestation) to administer a claim. *See Abraham*, 178 Wash. at 163. Each Department order within a claim has legal significance for the claim as a whole.[9] *See Abraham*, 178 Wash. at 163. As the orders interrelate to adjudicate the same workers' compensation claim, a claimant must not be able to collaterally attack an earlier final and binding order within the same claim that the Department uses throughout the full course of the claim. *See Marley*, 125 Wn.2d at 539. If a worker could challenge prior final and binding orders, the Department would have to verify and re-verify its underlying decisions at every interaction with a claimant. This would unduly burden the entire administrative scheme of the Industrial Insurance Act.

Before a claimant can be precluded by res judicata from later relitigating an issue in a claim, he or she must have had clear and unequivocal notice of the issues adjudicated by the prior order, so that the party had an opportunity to challenge the specific finding. *King v. Dep't of Labor & Indus.*, 12 Wn. App. 1, 5, 528 P.2d 271 (1974). The Board also requires the Department to put a worker on notice of the specific

[9]For instance, establishing the date of manifestation not only dictates the applicable time frame for calculating the time loss compensation rate, but it also dictates what medical treatment will be covered and what schedule will be used to award a permanent partial disability, if any. *See* RCW 51.36.010(2) ("upon occurrence of any injury to a worker entitled to compensation," the worker shall receive medical and surgical services); RCW 51.32.080(7) (permanent partial disability awards "are governed by the schedule in effect on the date of injury"); WAC 296-14-350(3).

issues being adjudicated in an order. *See In re Gary Johnson*, No. 86 3681, 1987 WL 61371 (Bd. Ind. Ins. App. July 13, 1987). This notice requirement is satisfied even if the worker does not understand the legal significance of the issues adjudicated in an order. *See Kustura*, 142 Wn. App. at 671; *Dep't of Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 45 P.3d 1121 (2002). "[I]t is well settled that a person is presumed to know the law such that ignorance of the law is not a defense." *Dellen Wood Products, Inc. v. Wash. State Dep't of Labor & Indus.*, 179 Wn. App. 601, 629, 319 P.3d 847 (2014) (terms of a statute provides notice of its requirements).

In *Kustura*, for example, the claimants failed to appeal Department orders establishing the wage rates. 142 Wn. App. at 664-65, 67. The Department then entered time loss compensation orders, applying those wage rates. *Kustura*, 142 Wn. App. at 664-68. The claimants appealed those time loss compensation orders, arguing that the underlying wage rates were incorrect. *Kustura*, 142 Wn. App. at 664-68. The court held that because they failed to appeal the earlier wage rate orders, those orders became final and binding, and were res judicata to the issues the orders encompassed. *Kustura*, 142 Wn. App. at 669-73. The court also held that the claimants were not entitled to equitable relief because the wage rate

orders were not translated to their native language. *Kustura*, 142 Wn. App. at 671-73.

Here, like in *Kustura*, res judicata bars Woods from collaterally attacking the date of manifestation order. The Department entered the order on January 19, 2007. Ex 9. The order clearly informed Woods that "date of manifestation has been determined to be 04/13/2006 for compensation purposes." Ex 9. Woods concedes that he failed to timely appeal that order. Appellant's Br. at 13-14. It thus became final and binding. RCW 51.52.110; *Marley*, 125 Wn.2d at 542-43. By positing that the wage order was incorrect because it relied on an incorrect date of manifestation order, Woods attempts to collaterally attack that date of manifestation order. Res judicata precludes him from doing so.

No other equitable principle salvages Woods's case. Although he argues that the date of manifestation order does not explain its legal effect, well-established case law holds that the claimant need not understand the legal effect of a decision. *Kustura*, 142 Wn. App. at 671; *Fields Corp.*, 112 Wn. App. at 458; Appellant's Br. at 30-33. Ignorance of the law is not a defense, even to pro se individuals. *Dellen Wood Products*, 179 Wn. App. at 629; *see West v. Wash. Ass'n of Cnty. Officials*, 162 Wn. App. 120, 137 n.13, 252 P.3d 406 (2011).

Moreover, Woods provides no authority that a worker can escape the requirements of finality by saying he did not understand a term (which he denominates as a "term of art") that has been defined by the Supreme Court and by administrative rule. Such an unsupported argument should be rejected. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992) (court does not consider unsupported arguments). In any event, contrary to Wood's arguments at Appellant's Br. at 35, a worker can look up what date of manifestation means by looking the Washington Administrative Code and to case law. *See* WAC 296-14-350; *Harry*, 166 Wn.2d at 12; *see also Kilpatrick*, 125 Wn.2d at 228; *Landon*, 117 Wn.2d at 125-26.

Regardless, it does not appear that Woods disputes what "date of manifestation" means. He instead argues that "'date of manifestation' relates only to the onset of occupational disease." Appellant's Br. at 35. But that is exactly how the Department applied its "date of manifestation" determination here. It applied the date of manifestation to subsequent orders regarding Woods' claim. Ex 9. The wage order used the date of manifestation to set the date from which wages would be calculated because that was when Woods became entitled to benefits. Ex 15. This Court should reject Woods's attempt to force the Department to pull

another injury date out of thin air so that he can receive additional time loss compensation.

Contrary to Woods's arguments, the date of manifestation order unambiguously put Woods on notice that the date of manifestation of his occupational disease was April 13, 2006, the date he first received medical treatment. Appellant's Br. at 33-38. Because Woods's arguments amount to nothing more than collaterally attacking the order establishing the date of manifestation, res judicata bars him from attacking that order, where he failed to timely appeal it. This Court should affirm.

C. Collateral Estoppel, Which Bars Parties from Relitigating the Same Issues, Would Also Bar Woods from Challenging the Date of Manifestation

Even if the Court agreed with the Board and superior court that the collateral estoppel doctrine was applicable here, collateral estoppel would still bar him from arguing that date is incorrect for purposes of calculating his time loss compensation rate. Collateral estoppel bars relitigation of an issue in a subsequent proceeding involving the same parties. *Christensen*, 152 Wn.2d at 306. Unlike res judicata, it bars a second litigation of issues between the parties. *Id.* (citing *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)). Collateral estoppel precludes only those issues that were necessarily and finally determined, and the parties must have had an opportunity to litigate the issue. *Christensen*, 152 Wn.2d at 307. The

doctrine promotes judicial economy and serves to prevent inconvenience to or harassment of parties. *Christensen*, 152 Wn.2d at 306.

To prevail, the party asserting collateral estoppel must prove four elements:

> (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen, 152 Wn.2d at 307. Collateral estoppel can be used to bar relitigation of an issue adjudicated by an administrative agency in an earlier proceeding. *Christensen*, 152 Wn.2d at 307. In those instances, courts look to three additional factors: "(1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations." *Christensen*, 152 Wn.2d at 308.

Here, Woods argues only that there was no identity of issues and that applying collateral estoppel would work an injustice, thereby agreeing that the date of manifestation was a final decision based on the merits and that all of the proceedings involved the same parties. Appellant's Br. at 24-38. Woods also does not discuss the three additional factors, thus waiving a challenge based on those factors. *See Cowiche Canyon*

Conservancy, 118 Wn.2d at 809 ("[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration"). Since the Department properly used the date of manifestation order to calculate Woods's wages for time loss compensation (and thus issue the overpayment order), the orders had the same identity of issues. And applying collateral estoppel would not work an injustice.

1. There is identity of issues, where the Department properly uses the date of manifestation to calculate wages for time loss purposes

There is identity of issues between the date of manifestation order and the subsequent time loss and overpayment orders. First, the order establishing the date of manifestation does exactly that—it orders that the date of manifestation is April 13, 2006 "for compensation purposes because this is the date that the disease required medical treatment." Ex 9.

Second, the Department needed to establish the date of manifestation to calculate Woods's wages for time loss compensation purposes (and issue the subsequent overpayment order). RCW 51.08.178(2); RCW 51.32.180; WAC 296-14-350; *Kilpatrick*, 125 Wn.2d at 227-28; *Landon*, 117 Wn.2d at 125-26. Reading the statutes as a whole, RCW Title 51's scheme clearly requires the Department to determine Woods's wages for the twelve months preceding the date of manifestation. RCW 51.08.178(2). As the date of manifestation statutorily forms the

"basis" of the compensation rate, the date of manifestation order presents the identical issue as the wage order. And since the Department derived the overpayment order from the wage order, the overpayment order presents the identical issue as the date of manifestation order.

The Court should reject Woods's arguments that there was no identity of issues. Appellant's Br. at 24-38. Woods appears to argue that there is no identity of issues because the date of manifestation order does not explain that it could be used to calculate the compensation rate and because the date of manifestation is ambiguous. Appellant's Br. at 24-38. These arguments fail.

The date of manifestation order does explain that it can be used for compensation purposes, stating that the "date of manifestation has been determined to be 04/13/2006 *for compensation purposes* because this is the date the disease required medical treatment." Ex 9 (emphasis added). Compensation can occur in many forms throughout a claim, including time loss compensation. The date of manifestation order states it is to be used for compensation purposes, so Woods's argument falls flat. Ex. 9.

Relatedly, Woods's argument that the date of manifestation order must explain what subsection under RCW 51.08.178 will be used to calculate time loss compensation makes no sense. Appellant's Br. at 32. The date of manifestation order occurred before the time loss

compensation order. Exs 9, 15. At that time, the Department could not know what subsection would be used to calculate time loss compensation, or even whether time loss compensation would be awarded. *Compare* Ex 9 *with* Ex 15. The final and binding date of the modification order thus does not preclude Woods from challenging a calculation made under RCW 51.08.178—it only precluded him from challenging the date used to calculate those benefits. *Contra* Appellant's Br. at 32.

The date of manifestation order is not ambiguous or confusing. It means what it says—"the date of manifestation has been determined to be 04/13/2006 for compensation purposes because this is the date the disease required medical treatment." Ex 9. This language tracks RCW 51.32.180(b), which establishes the compensation rate for occupational diseases at "the date the disease requires medical treatment."[10] While Woods correctly notes that the Department uses the date of manifestation in different contexts throughout the adjudication of a claim, that does not mean the order's language is ambiguous. As the Department uses the date

[10]RCW 51.52.180(b) provides that the date could also be when the worker becomes partially or totally disabled, but no evidence in the record establishes when Woods became partially disabled.

of manifestation in different contexts, it makes sense to use it to calculate Woods's wages, as required by statute.[11]

And Woods presents a red herring by arguing that the date of manifestation order is confusing because previous orders said that the Department would establish chargeable employers. *See* Appellant's Br. at 37-38. The Department earlier asked Woods for additional information and notified Woods that it had not yet determined employer liability and that it would enter an order establishing chargeable employers and percentage of liability. Exs 4, 8. In the same order that established the date of manifestation, the Department ordered that "[t]here are no chargeable employers for this claim." Ex 9. Woods did not timely appeal that decision, making it final and binding. *Marley*, 125 Wn.2d at 542-43. The same order thus resolved any questions about the existence of chargeable employers. His argument lacks merit.

2. Applying collateral estoppel does not work an injustice to Woods

Collateral estoppel does not work an injustice to Woods because he had an opportunity to appeal the date of manifestation order, but failed to do so. When analyzing injustice in this context, courts are "generally concerned with procedural, not substantive, irregularity." *Christensen*,

[11]Even assuming Woods correctly argues that the Department should use some other date to calculate his wages, he points to no other date that would be consistent with the statutes.

152 Wn.2d at 309. If the proceeding did not afford the parties sufficient opportunity to fully litigate the issue, then it would be unjust to hold the parties to that decision. *Christensen*, 152 Wn.2d at 309. The analysis does not focus on the substantive result, since "whether the decision in the earlier proceeding was substantively correct is generally not a relevant consideration in determining whether application of collateral estoppel would work an injustice." *Christensen*, 152 Wn.2d at 317.

Here, the date of manifestation order told Woods that he had 60 days to appeal or the order would become final and binding. Ex 9. He filed no timely appeal. Ex 14. He thus waived his opportunity to contest and present evidence showing that the date of manifestation order was incorrect. RCW 51.52.060. There is no procedural irregularity here, and no injustice occurred when the Department subsequently used the date of manifestation order to calculate Woods's wages.

Woods argues only that the injustice occurred because the amount awarded was unfairly low, which is nothing more than an impermissible challenge to the substance of the date of manifestation order. Appellant's Br. at 36. Even in making that argument, Woods does not contend that the date of manifestation itself is incorrect or that the Department's math was wrong. Appellant's Br. at 35-38. He instead argues that because applying the date of manifestation order to the compensation rate statute led to an

"unfair" wage rate, the date of manifestation order should be rejected. Appellant's Br. at 36. This argument does not address whether a procedural irregularity occurred, but is an attempt to use "injustice" as a backdoor way to evade the orders and statutes to achieve a particular result—increased time loss compensation. This Court should reject this backdoor, results-oriented request.

D. Woods's Unpreserved Arguments Challenging the Wage and Overpayment Orders Fail, as Substantial Evidence Supports the Findings

Woods also makes the unpreserved and incorrect argument that even if the date of manifestation order is final and binding, the wage and overpayment orders were still incorrect. Appellant's Br. at 39-40. First, this Court should not review this claim, where Woods never raised this issue before the Board. A superior court can only review those issues that were raised at the Board in the petition for review. RCW 51.52.104. A party waives an issue by not raising it in his or her petition for review of the proposed decision. *See* RCW 51.52.104 ("petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein."); *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012), *review denied*, 297 P.3d 706 (2013); *Allan v. Dep't of Labor &* Indus., 66 Wn. App. 415, 422, 832

P.2d 489 (1992). The appellate court's scope of review similarly constrains this Court to reviewing only those issues that the superior court could address. RCW 51.52.104, .115, .140; *see* RAP 2.5(a).

Here, as the superior court noted, Woods focused only on the preclusive effect of the date of manifestation order. He presented no evidence to the Board showing that the Department incorrectly calculated benefits or established an overpayment. Exs 1-21. And his petition for review argues only that the Board misunderstood the issues surrounding collateral estoppel, making no argument that the calculations were otherwise incorrect. BR 9-11. Because Woods never asked the Board to address the calculations, the superior court could not address the issue. RCW 51.52.104, .115. The lack of a record, both at the Board and superior court, similarly precludes this Court from addressing the issue.

Even if the Court could address the issue, there is no evidence in the record contradicting the Department's calculations, so substantial evidence supports the Board's decision. *See Ruse*, 138 Wn.2d at 5 (court reviews factual findings for substantial evidence). While Woods posits that the Department should have looked to his wages at Drury Construction since that was "presumably" his job of injury, the Department concluded that there was no chargeable employer. Ex 9; Appellant's Br. at 39. Since no chargeable employer exists, it makes no

sense to look at wages from a job that Woods left at least three years before the date of manifestation. Moreover, Woods' argument depends on a collateral attack on the date of manifestation, and accordingly, the Court should disregard it.

The Court should also reject Woods's implied argument that a social security printout of his income since 1965 demonstrates that his wages should be higher. Ex 21; Appellant's Br. at 40. But there is no evidence that that printout contradicts the Department's calculations. In fact, it shows that Woods earned $945 in 2005 and $1,275 in 2006, which would include the relevant time period under RCW 51.08.178. Ex 21. Nothing in those numbers shows that the calculations were wrong. Woods's argument fails.

E. This Court Should Not Award Attorney Fees

This Court should deny Woods's attorney fee request. Appellant's Br. at 41. Attorney fees may be awarded to a worker who prevails in court only if (1) the Board decision is "reversed or modified" and (2) the litigation's result affected the Department's "accident fund or medical aid fund." RCW 51.52.130(1); *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). Because Woods should not prevail in this appeal, this Court should deny his attorney fee request.

VI. CONCLUSION

Woods failed to timely appeal the order establishing the date of manifestation of his occupational disease, so the order became final and binding. While he now disputes the result of applying that date of manifestation to calculate his benefits, he may not collaterally attack that first order. This Court should affirm.

RESPECTFULLY SUBMITTED this 2nd day of July, 2014.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH H. WOODS, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

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